



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

OFFICE OF THE CHAIRMAN

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

Alaska Democratic Party and Jayson)
Smart, his official capacity as treasurer,)
Tony Knowles for U.S. Senate and Leslie)
Ridle, in her official capacity as treasurer)

MUR 5564

STATEMENT OF REASONS OF CHAIRMAN ROBERT D. LENHARD

General Counsel's Report #2 (the "GCR") in this case recommended that the Commission enter into pre-probable cause conciliation with the Alaska Democratic Party ("ADP") and Tony Knowles' U.S. Senate Campaign ("Knowles") on the theory that the ADP made approximately \$1.6 million in excessive in-kind contributions to Knowles during the 2004 election. The alleged in-kind contributions allegedly arose from the way in which ADP operated its field program. For several months prior to the November 2004 election, ADP employees and volunteers used door-to-door canvassing, telephone calls, and other grass roots methods to identify likely supporters of the Democratic candidate for Senate Tony Knowles and 28 State House District candidates and 10 State Senate District candidates.¹ The information the canvassers collected was recorded in a database which was later used by the Alaska Democratic Party and by candidates for state office to encourage individuals to get out and vote on Election Day. The field program also registered

¹ While Senator John Kerry was also on the ballot as candidate for President, he was viewed from the start as having no realistic chance of defeating President Bush in Alaska. As a consequence, no effort was made by the ADP on behalf of Senator Kerry's campaign.

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voters and recruited volunteers. Prior to the 2004 election, the ADP had been largely moribund and the excitement generated by the Knowles candidacy was seen as a way to revitalize the party. Particular emphasis was placed on building a voter file because, prior to this election, the ADP did not have a list of who its supporters were in the state.

The field program was only part of the Alaska Democratic Party's activities in 2004. The Party also paid for public communications, which mostly consisted of direct mail, much of which featured candidate Tony Knowles. These communications were paid for under a different part of our regulatory regime and did not factor into the allegations in MUR 5564. The Party also paid for activities directly in support of its state candidates, which the ADP paid for from a separate account that operated in compliance with State law. The activity that occurred within the ADP's state account was also not raised in MUR 5564. This matter turned on whether the Party violated federal law in the way it organized and paid for its field program. While the Knowles campaign paid the Alaska Democratic Party \$474,000 for its share of this program, the GCR concludes that is was a significant underestimate of the correct allocation of cost, and instead, the Knowles campaign should have paid for almost the entire ADP field program. When evaluated under the proper legal standard, I believe the record shows that the ADP operated and funded its field program within the limits of the law. Thus I voted to dismiss this case.

The cornerstone of the GCR's conclusion that the ADP's field program violated federal law is that the program was "coordinated" with the Knowles campaign and that the program "directly benefited" the Knowles campaign. The coordination took the form of Knowles campaign staff consulting with the Alaska Democratic Party on the evolving state of the race, including the planning and implementation of the field plan. The Knowles campaign is seen as "directly benefiting" from the field program because his candidacy was frequently mentioned by

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staff in discussing the importance of the upcoming election. The GCR argues that almost the entire field plan therefore should be treated as an in-kind contribution to Knowles, either under our regulations regarding party coordinated communications (11 CFR 109.37) or under the general coordination rules at 11 CFR 109.20(b), which the GCR characterizes as a "catch all" provision for coordinated expenditures. GCR at 31. The GCR does not evaluate particular payments made by the ADP under 11 CFR 109.37 or 109.20(b), but rather "estimates" that field program employees spent over three-quarters of their time "on direct advocacy for Knowles." It concludes that, giving respondents the benefit of the doubt, two-thirds of the total field program cost should be treated as an in-kind contribution to Knowles. GCR at 30.

I believe the GCR applies the wrong legal analysis to this case. Commission regulations do not require a political party to estimate what percentage of its activities constitute "direct advocacy" for one candidate or another, and to treat the costs of such activities as an in-kind contribution to the degree that the party has collaborated with its candidates on campaign strategy. Rather, particular Commission regulations must be applied to particular types of cost. Evaluated under the legal standards discussed below, I believe the \$474,000 reimbursed to the ADP by Knowles or credited against the ADP's 2 U.S.C. § 441a(d) coordinated expenditures limits was more than sufficient to cover any costs required to be borne by Knowles.

The first theory of liability advanced in the GCR is that these staff and overhead costs should have been treated as "coordinated party communications."² A communication by a political party constitutes a "coordinated party communication," and consequently must be counted against the party's coordinated expenditure limit or as an in-kind contribution, *only* if the

² The consequence of this analysis is that these expenditures were violations because the amount spent exceeded the coordinated spending limits found at 2 USC 441a(d).

communication satisfies 11 CFR 109.37. Furthermore, in order to satisfy the content prong of 109.37, a communication must be a "public communication." 11 CFR 109.37(a)(2). Most of the costs related to the ADP's field program were payments by the ADP for the salaries and benefits of its employees, and for costs related to maintaining office space. GCR at 12, 14. As such, these costs were not for "public communications" (such as radio ads and direct mail) as that term is defined in our regulations.³ 11 CFR 100.26. These costs include door to door canvassing, manning campaign offices and other traditional grass roots activities.⁴

The second theory advanced in the GCR is that our regulation at 11 CFR 109.20(b) which defines a general definition of "coordination" serves as a "catch all" definition that captures political party communications that otherwise does not meet the specific requirements of coordinated party communications set forth in 11 CFR 109.37. I cannot agree with this approach. The Commission crafted its regulations at 11 CFR 109.37 with specificity and to the degree that a coordinated party communication does not meet the test set forth there, it is not a coordinated party communications.⁵

³ As noted above, the cost of public communications were paid for by the ADP and the Knowles campaign in a way that is different from how they paid for the field program and the cost of those public communications were not before us in MUR 5564.

⁴ Some of the staff time was spent on making phone calls to likely Democratic voters to determine the accuracy of the voting file the ADP was using and to gauge support for party candidates. The record before us was based upon the interview of a small number of ADP staff long after the campaign, and the staff did not keep time and activity records during the campaign. At least some of these calls asked voters to state a preference between Knowles and his opponent, Senator Lisa Murkowski. Because the Knowles campaign was aware these calls were going to occur, the GCR argues that they were a coordinated communication and the mention of Knowles in the questions could arguably make it a coordinated public communication. However, it is not the argument made in the GCR and seems too slim a reed upon which to build an argument that the entire \$1,600,000 field program constituted an illegal in-kind contribution to the Knowles campaign.

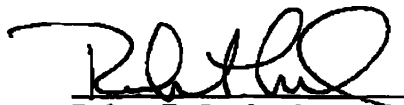
⁵ The explanation and justification for 109.20 states that it addresses expenditures "that are not made for communications..." 2003 E&J at 425. Indeed, if 109.20 were read to apply to communications it would render meaningless the Commission's coordinated communications and party coordinated communications at 11 CFR 109.21 and 109.37.

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Commission regulations state that a political committee is not required to attribute its personnel and overhead costs to any particular candidate unless the expenditures "are made on behalf of a clearly identified candidate *and the expenditure can be directly attributed to that candidate.*" 11 CFR 106.1(c) (emphasis added). Because the ADP employees that executed the field program were at all times supervised and controlled by the ADP's executive director, and were never under the supervision or control of Knowles, expenditures for their salaries and benefits cannot be directly attributed to Knowles.⁶ Nor can the ADP's expenditures for office space and other overhead costs be directly attributed to Knowles, as the ADP offices were occupied by ADP staff conducting ADP business.

At the end of this analysis, I saw nothing in the record to suggest that the \$474,000 reimbursed to the ADP by Knowles or credited against the ADP's 2 U.S.C. § 441a(d) coordinated expenditures limits was insufficient to cover any disbursements by the ADP that would properly be characterized as coordinated party communications or in-kind contributions. I therefore voted to dismiss the case.

12/31/07
Date


Robert D. Lenhard
Chairman

⁶ If an unauthorized political committee were to be organized and operated for the sole purpose of electing a particular federal candidate, its expenditures for staff might be "directly attributed to that candidate," within the meaning of 11 CFR 106.1(c), even if the staff were supervised and controlled solely by the committee. See e.g. MUR 5031, 17th District Victory Committee. However, the ADP is a state political party with its own independent goals and interests, and it deployed staff in pursuit of those interests. Thus, because the field program employees were at all times supervised and controlled by the ADP, and not by Knowles, their efforts cannot be "directly attributed" to Knowles.